

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELAINE L. CHAO, Secretary
of Labor, United States
Department of Labor,

Petitioner,

v.

SPOKANE TRIBE OF INDIANS,

Respondent.

NO. CV-07-0354-CI

**ORDER DECLINING TO ADOPT REPORT
AND RECOMMENDATION AND DENYING
MOTION TO QUASH**

Before the Court for review is Magistrate Judge Cynthia Imbrogno's Report and Recommendation for Order Granting Respondent Spokane Tribe of Indians' ("the Tribe") Motion to Quash an administrative subpoena. (Ct. Rec. 61.) After reviewing the material on file and the applicable legal authority, the Court respectfully disagrees with the Report and Recommendation. For the reasons given below, the Court denies the Tribe's motion to quash.

BACKGROUND

After years of negotiations,¹ the Tribe signed a Gaming Compact

¹ The Resolution authorizing the Tribe to sign the Compact states, "[F]or over 16 years, the Tribe has been involved in negotiations and litigation with the United States and with the State of Washington concerning the Tribe's inherent right to engage in Class III Gaming, as that term is defined in the Indian Gaming

1 with the state of Washington in 2007 ("the Compact"), as authorized
2 by the federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§
3 2701-2721. It is undisputed for purposes of this motion that the
4 Tribe's casino in Chewelah ("the Casino") is operated consistent
5 with the IGRA and the Compact. The Casino, which is owned and
6 operated by the Tribe, employs, and is open to, both tribal members
7 and non-members.

8 The Tribal Business Council controls the operation of the
9 Casino, which is located on trust land. (Ct. Rec. 37 at 16 & 17.)
10 Consistent with the Compact, the Tribe uses the casino² income to
11 fund the fire department, tribal college, and a variety of tribal
12 programs, such as senior citizen, developmentally-disabled adult,
13 EMT, general food distribution, social service, mental health
14 treatment, drug treatment, cultural education, and natural resource
15 programs. Casino income comprises the majority of the Tribe's
16 income and once placed into the tribal general fund is inseparable
17 from tribal government activities. (Ct. Rec. 21 at 2.)

18 The Department of Labor (DOL) filed its Petition for
19 Enforcement of an Administrative Subpoena after the Tribe refused to
20 provide requested wage and hour records for employees working at the
21 Casino.³ The subpoena is part of an investigation into alleged Fair
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23 Regulatory Act." (Ct. Rec. 35 at 3.)

24 ² The Tribe operates another casino, in addition to the
25 Chewelah Casino.

26 ³ Specifically, the subpoena directs the Tribe to provide wage
27 records and books, documents, and other tangible things regarding
28 "all other conditions and practices of employment" from June 15,

1 Labor Standards Act (FLSA) violations launched as a result of a
2 complaint forwarded to the Washington State Department of Labor and
3 Industries in August 2007. The Tribe responded to the subpoena with
4 the instant motion to quash, contending it is a sovereign nation
5 that is not subject to the provisions of the FLSA. DOL argues that
6 the Tribe, even as a sovereign nation, is subject to the FLSA - a
7 statute of general applicability.

8 **AUTHORITY & ANALYSIS**

9 **A. Court Review of An Administrative Subpoena**

10 Generally, the scope of judicial inquiry into an agency
11 subpoena enforcement proceeding is narrow. *EEOC v. Karuk Tribal*
12 *Housing Auth.* ("Karuk"), 260 F.3d 1071, 1076 (9th Cir. 2001).
13 However, an administrative subpoena may be quashed by a court if the
14 agency lacks jurisdiction. *Id.* at 1077. Accordingly, the Court
15 below determines whether the DOL has jurisdiction to subpoena the
16 Casino's employment records pursuant to the FLSA; the Court is not
17 determining whether the Tribe has any defenses to the FLSA violation
18 allegations.

19 **B. Application of the FLSA to the Casino**

20 The analysis of whether a tribe is entitled to immunity is full
21 of twists and turns. Although Indian tribes enjoy sovereign
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23 2005, until the present. The subpoena includes requests for copies
24 of W-2 forms for all employees, phone numbers of all employees,
25 annual gross sales for the past three years, names of three
26 suppliers/vendors from outside the state of Washington, and copies
27 of all employment contracts and pay stubs. (Ct. Rec. 1, Ex. D, Att.
28 1.)

1 immunity from private lawsuits, they are not immune from suits
2 brought by the federal government. *Karuk*, 260 F.3d at 1075. In
3 particular, a tribe is not entitled to immunity involving a federal
4 statute of general applicability that is silent on the issue of
5 applicability to Indian tribes, absent satisfaction of one of the
6 three exceptions articulated by the Ninth Circuit in *Donovan v.*
7 *Coeur d'Alene Tribal Farm* ("Coeur d'Alene"). 751 F.2d 1113, 1115
8 (9th Cir. 1985) (citing to *Fed. Power Comm'n v. Tuscarora Indian*
9 *Nation*, 362 U.S. 99 (1960)).

10 Therefore, the Court must first decide whether the FLSA is a
11 statute of general applicability. The Ninth Circuit soundly
12 answered this question in *Snyder v. Navajo Nation*: "The FLSA is a
13 statute of general applicability" that is silent on whether it
14 applies to Indian tribes. 382 F.3d 892, 894-95 (9th Cir. 2004).
15 Accordingly, the Court must now determine whether one of the three
16 *Coeur d'Alene* exceptions apply:

17 (1) the law touches "exclusive rights of self-governance
18 in purely intramural matters;" (2) the application of the
19 law to the tribe would "abrogate rights guaranteed by
20 Indian treaties;" or (3) there is proof "by legislative
history or some other means that Congress intended [the
law] not to apply to Indians on their
reservations"

21 *Coeur d'Alene*, 751 F.2d at 1116 (quoting *United States v. Farris*,
22 624 F.2d 890, 893-94 (9th Cir. 1980)). The later two exceptions are
23 not at issue here; rather, the focus is on the first exception - the
24 tribal self-government exception.

25 "[T]he tribal self-government exception is designed to except
26 purely intramural matters such as conditions of tribal membership,
27 inheritance rules, and domestic relations from the general rule that
28 otherwise applicable federal statutes apply to Indian tribes."

1 *Coeur d'Alene*, 751 F.2d at 1116 (determining that OSHA applied to
2 the tribal-owned and operated farm because it participated in
3 interstate commerce and employed non-Indians and Indians). The
4 Ninth Circuit has analyzed the *Coeur d'Alene* "tribal self-
5 government" exception in a number of cases - none involved a tribal
6 casino. See *Snyder v. Navajo Nation*, 382 F.3d 892 (9th Cir. 2004);
7 *Karuk*, 260 F.3d 1071 (9th Cir. 2001); *U.S. Dep't of Labor v. Occup.*
8 *Safety & Health Review Comm'n*, 935 F.2d 182, 184 (9th Cir. 1991)
9 (finding, notwithstanding the importance of the mill's revenue to
10 the tribal government, that OSHA applied to a tribally-owned and
11 operated saw mill because the mill employed a large number of non-
12 Indians and sold its product in interstate commerce); *Lumber Indus.*
13 *Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th
14 Cir. 1991) (applying ERISA to a tribally-owned and operated sawmill,
15 even though such application may subject the mill to liability for
16 money damages, because the tribe was still free to pass retirement
17 plan ordinances). The Court finds *Karuk's* thorough analysis to be
18 the most helpful to resolve the issue presently before the Court.

19 In *Karuk*, the Ninth Circuit determined that the application of
20 the Age Discrimination in Employment Act (ADEA) to a tribe's housing
21 authority would touch upon tribal self-government. 260 F.3d 1071
22 (9th Cir. 2001). The Ninth Circuit emphasized that the tribal self-
23 government exception involves two elements: (1) a self-governance
24 element and (2) a purely intramural matter element. *Id.* at 1079
25 (citing *Coeur d'Alene*, 751 F.2d at 1116); see also *Reich v.*
26 *Mashantucket Sand & Gravel*, 95 F.3d 174, 179-80 (2d Cir. 1996)
27 (recognizing self-governance and purely intramural matter to be
28 distinct elements when holding that the tribal-owned and operated

1 construction business did not satisfy the purely intramural matter
2 element given the commercial and service nature of its work, its
3 employment of non-Indians, and continued work on a casino operating
4 in interstate commerce).

5 The Ninth Circuit analyzed the self-governance element first.
6 *Karuk*, 260 F.3d at 1080-81. The Ninth Circuit highlighted that the
7 federal law providing funding for the housing authority specified
8 that the funds "should be used in a manner that recognizes the right
9 of Indian self-determination and tribal self-governance." *Id.* at
10 1080. Based largely on the language of this federal funding law,
11 the Ninth Circuit determined the housing authority was an arm of the
12 tribe that occupied "a role quintessentially related to self-
13 governance." *Id.* In reaching this conclusion, the Ninth Circuit's
14 self-governance analysis identified two requirements: (1) the entity
15 functions as an arm of the tribe and (2) the entity serves a
16 governmental role or function. *Id.* (finding the housing authority
17 "functions as an arm of the tribal government *and* in a governmental
18 role" (emphasis added)). Accordingly, if the activity of the arm-
19 of-the-tribe entity is essentially commercial, the governmental role
20 or function requirement is not met and the self-governance element
21 is not satisfied. *Id.*

22 In analyzing the purely intramural matter element, the Ninth
23 Circuit recognized:

24 In general, tribal relations with non-Indians fall outside
25 the normal ambit of tribal self-government. Furthermore,
26 intramural matters generally consist of conduct the
immediate ramifications of which are felt primarily within
the reservation by members of the tribe.

27 *Id.* at 1081 (quoting *Mashantucket Sand & Gravel*, 95 F.3d at 181).
28 Factors that the Ninth Circuit looked at to assess whether the

1 dispute touched upon purely intramural matters included the parties
2 to the dispute, whether the tribe had an internal process for
3 adjudicating such disputes, the involvement of non-Indians in the
4 tribal entity, and whether the tribal entity served non-Indians.
5 *Id.* After weighing these factors, the Ninth Circuit determined the
6 dispute between a tribal member and the housing authority, which
7 employed and housed largely tribal members, touched upon a purely
8 intramural matter. *Id.* Accordingly, the Ninth Circuit concluded
9 that the ADEA did not apply to the housing authority because it
10 touched exclusive rights of self-governance in purely intramural
11 matters. *Id.* at 1082.

12 Unfortunately for district courts seeking clear guidance, the
13 Ninth Circuit's 2004 *Snyder v. Navajo Nation* decision merged the
14 elemental considerations articulated in *Karuk*. 382 F.3d 892 (9th
15 Cir. 2004) (holding that the FLSA's overtime pay provision did not
16 apply to tribal law-enforcement officers under the *Coeur d'Alene*
17 tribal self-governance exception). For instance, in the following
18 analysis, the self-governance and purely intramural matter elements
19 are merged:

20 The Navajo National's DPS maintains law and order within
21 the reservation and this is a traditional governmental
22 function. The FLSA contains an express exemption for
23 state and local law-enforcement officers. 29 U.S.C. §§
207(k), 207(o). Tribal law enforcement clearly is a part
of tribal government and is for that reason an appropriate
activity to exempt as intramural.

24 *Id.* at 895. The Court concludes the Ninth Circuit's merging likely
25 resulted from the fact that tribal law enforcement officers
26 primarily seek to ensure the safety of tribal members - a purely
27 intramural matter. In addition, the Ninth Circuit's analysis was
28 surely heavily influenced by the FLSA's statutory exemption for

1 state and local law-enforcement officers - a reasonable extension
2 would be to apply this exemption to tribal law-enforcement officers
3 as there is no practical distinction between the responsibilities of
4 the state and local law-enforcement and tribal law-enforcement
5 officers. Accordingly, the Court determines that *Karuk's* tribal
6 self-governance analysis still controls.

7 With *Karuk* as its guide, the Court analyzes whether the FLSA
8 touches upon "exclusive rights of self-governance in purely
9 intramural matters" under these circumstances. As articulated
10 above, this analysis requires the Court to determine under the self-
11 governance element whether the Casino functions as an arm of the
12 Tribe and serves a governmental role or function, and then whether
13 the FLSA touches upon a purely intramural matter.

14 The question of whether the Casino functions as an arm of the
15 Tribe appears to be answered by the Ninth Circuit's *Allen v. Gold*
16 *Country Casino* decision. 464 F.3d 1044 (9th Cir. 2006). In *Allen*
17 - a private lawsuit against a tribal casino -, the Ninth Circuit
18 held, "In light of the purposes for which the Tribe founded this
19 Casino and the Tribe's ownership and control of its operations,
20 there can be little doubt that the Casino functions *as an arm of the*
21 *Tribe.*" *Id.* at 1046 (emphasis added). The Ninth Circuit focused on
22 one of IGRA's declared purposes, which is "to provide a statutory
23 basis for the operation of gaming by Indian tribes as a means of
24 promoting tribal economic development, self-sufficiency, and strong
25 tribal governments."⁴ 25 U.S.C. § 2702(1). Similar to *Allen's*
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27 ⁴ The economic goal of a tribal casino is to make money - the
28 same goal of any other commercial enterprise.

1 assessment of the IGRA's purpose, *Karuk's* "arm of the tribe"
2 analysis included an assessment of the Native American Housing
3 Assistance and Self-Determination Act's purpose. Accordingly, after
4 considering the stated purpose of the IGRA, *Allen's* discussion of
5 the IGRA, and the language of the Compact, the Court concludes that
6 the Casino, which is owned and operated by the Tribe, functions as
7 an arm of the Tribe given that its principal purpose is to develop
8 tribal self-sufficiency by generating funds for tribal programs and
9 generating jobs for tribal members - the arm-of-the-tribe
10 requirement of the self-governance element is satisfied.

11 This conclusion, however, does not equate to a finding that the
12 Casino serves a governmental role or function - the second self-
13 governance element requirement. See *Mashantucket Sand & Gravel*, 95
14 F.3d at 180 ("That an entity is owned by a tribe, operates as an arm
15 of a tribe, or takes direction from a tribal council, does not ipso
16 facto elevate it to the status of a tribal government). And the
17 Court finds the Casino does not serve a governmental role or
18 function. "[O]peration of a casino is not a traditional attribute
19 of self-government." *San Manuel Indian Bingo & Casino v. NLRB*, 475
20 F.3d 1306, 1315 (D.C. 2007). The interstate commercial nature of
21 the Casino is the same as the tribal farming operation in *Coeur*
22 *d'Alene*, the saw mills in the Warm Springs cases, and the
23 construction company in *Mashantucket Sand and Gravel* - rather than
24 the housing authority providing shelter in *Karuk* and the tribal law
25 enforcement ensuring safety in *Navajo Nation*. The Tribe highlights,
26 without the Casino's funding, the Tribe's ability to finance its
27 governmental programs would be significantly hampered. The same
28 could have been true of the commercial operations in Warm Springs,

1 *Coeur d'Alene*, and *Mashantucket*. However, the Ninth Circuit's *Coeur*
2 *d'Alene* holding establishes that the economic impact of the
3 application of a federal statute on the tribal business is not a
4 factor to consider. *Coeur d'Alene*, 751 F.2d at 1116. This is for
5 sound reason. A business-prudent tribe seeks a broad-based economy
6 - not one simply dependent on a single enterprise. A tribal
7 government solely dependent upon casino income faces economic
8 difficulty during an economic downturn.⁵ Utilizing the economic
9 impact of the to-be-enforced federal law as a consideration in the
10 *Coeur d'Alene* tribal self-governance exception analysis may
11 discourage a tribe from diversifying its business endeavors.
12 Accordingly, the amount of money an arm-of-the-tribe entity brings
13 to the tribe does not influence the determination of whether that
14 entity serves a governmental role or function. The fact that the
15 Casino *funds* a significant portion of the Tribe's governmental
16 services is irrelevant; the question rather is whether the Casino
17 serves a governmental role or function. The Court finds it does
18 not; the second requirement of the self-governance element is not
19 satisfied.

20 In addition, the Court finds the FLSA does not touch upon
21 primarily intramural matters in this instance. The Casino employs,
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23 ⁵ For example, today, on September 24, 2008, casino stocks
24 for a 52-week range evidenced the following downturn: (1) MGM
25 Mirage ranged from 21.65 to 100.50, and as of today is at 29.95; (2)
26 Wynn Resorts ranged from 69.27 to 176.04, and as of today is at
27 90.94; (3) Las Vegas Sands ranged from 30.56 to 148.76, and as of
28 today is at 33.90. <http://schwab.com>.

1 and is open to, both tribal members and non-members. The Court is
2 unaware of whether a tribal member or a non-member initiated the
3 underlying complaint. The Casino employee manual addresses terms of
4 employment; yet, any conflict between the FLSA and the terms of the
5 employee manual does not touch upon a primarily intramural matter
6 given that the Casino - an interstate commercial enterprise -
7 employs both tribal members and nonmembers. The Court recognizes
8 that the Ninth Circuit in *Karuk* acknowledged that a tribe generally
9 has the "ability to make at least certain employment decisions
10 without interference from other sovereigns." *Karuk*, 260 F.3d at
11 1081. The Casino, however, is significantly different than a tribe-
12 run health center and a tribe-run housing authority. See *id.*
13 (citing cases). The Casino is a for-profit commercial business
14 participating in, and seeking through advertising, interstate
15 business, largely of non-members.

16 The Court recognizes that one of the stated purposes of the
17 IGRA is to encourage tribal self-sufficiency, and that the Ninth
18 Circuit has "not cabined the intramural exception to those listed in
19 *Coeur d'Alene*" - conditions of tribal membership, inheritance rules,
20 and domestic relations. *Navajo Nation*, 382 F.3d at 895. However,
21 the *Coeur d'Alene* exceptions are only to be applied "in those rare
22 circumstances where the immediate ramifications of the conduct are
23 felt primarily within the reservation by members of the tribe and
24 where self-government is clearly implicated." *Id.* This is not a
25 rare instance; the enforcement of the DOL administrative subpoena
26 will not be felt primarily within the reservation by tribal members
27 nor will it implicate self-government. Instead, a complete analysis
28 of the *Coeur d'Alene* considerations "result[s] in a mosaic that is

1 distinctly inconsistent with the portrait of an Indian tribe
2 exercising exclusive rights of self-governance in purely intramural
3 matters." *Id.* at 181.

4 **CONCLUSION**

5 For the above-given reasons, the Court concludes the FLSA
6 applies to the Casino and, therefore, the Court has jurisdiction
7 over the administrative subpoena. Accordingly, the Tribe's motion
8 to quash is denied. Because the Court declines to adopt the Report
9 and Recommendation, the Court does not specifically address DOL's
10 objections (Ct. Rec. 73). **IT IS HEREBY ORDERED:**

11 1. The Report and Recommendation (Ct. Rec. 61) is **NOT**
12 **ADOPTED.**

13 2. Respondent's Motion to Quash (Ct. Rec. 19) is **DENIED.**

14 3. This matter is **REMANDED** to Magistrate Judge Imbrogno for
15 further proceedings on Petitioner's Petition for Enforcement of an
16 Administrative Subpoena (Ct. Rec. 1), but the administrative
17 subpoena shall not be enforced any earlier than Thursday, October 9,
18 2008, which will provide the Tribe with time to obtain a stay of
19 enforcement of the subpoena from the Ninth Circuit by Wednesday,
20 October 8, 2008, as part of an appeal.

21 **IT IS SO ORDERED.** The District Court Executive is directed to
22 enter this Order and forward copies to counsel

23 **DATED** this 24th day of September 2008.

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25 _____ S/ Edward F. Shea

26 EDWARD F. SHEA
27 UNITED STATES DISTRICT JUDGE

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